(19)

No. 87-1555

In The Supreme Court of the United States October Term, 1988

JAMES H. BURNLEY, IV, SECRETARY, DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*

On Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AND AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union

("ACLU") is a nationwide, non-profit organization with over 250,000 members, dedicated to the protection and defense of the civil rights and civil liberties of all Americans. The ACLU has long been active in the defense of Fourth Amendment rights, having appeared before this Court as amicus in such recent Fourth Amendment cases as National Treasury Employees Union v. Von Raab, No. 86-1879 (now pending); O'Connor v. Ortega, 107 S. Ct. 1492 (1987); and New Jersey v. T.L.O., 469 U.S. 325 (1985). The ACLU of Northern California filed an amicus brief in the court of appeals below.

This case presents important Fourth Amendment issues arising from an unprecedented effort by the federal government to compel railway employers to require their employees to give blood, urine and breath samples and to test those samples for evidence of use of

alcohol or other legal or illegal drugs. The ACLU and its local affiliates around the United States (including the ACLU of Northern California and the ACLU of Illinois) have been and are counsel or amicus in numerous cases challenging government-ordered blood and urine testing programs. Accordingly, we believe that our involvement in and familiarity with the blood and urine testing field and the approaches taken by the lower courts will assist the Court in considering the issues presented by this case.1/

STATEMENT

This case involves regulations of the Federal Railroad Administration ("FRA") that require railroads to take blood and urine samples from their

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1/ The written consent of the parties to the filing of this brief have been filed with the Clerk.

employees and to test those samples for evidence of drug or alcohol use following certain train accidents and fatal incidents,2/ and that "authorize" the railroads to conduct urine and breath tests following certain accidents, incidents or rule violations.3/ Subpart C of the regulations requires railroads to take and test blood and urine samples from all members of the train and engine crew (as well as signalmen, dispatchers and other employees) following the accident or incident without regard to whether there is any reason to suspect the employees of drug or alcohol use, or of impairment, and without regard to whether, in light of his duties, an employee's actions could possibly be

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2/ Subpart C of the FRA regulations, 49 C.F.R. §§219.201 to 219.213.

3/ Subpart D of the FRA regulations, 49 C.F.R. §§219.301 to 219.309.

responsible for the mishap. As an incident referred to in the record demonstrates, if a tornado strikes a train causing some cars to derail, all of the train's crew members--including ticket takers--will all have to undergo blood and urine testing for drug or alcohol use.4/ The regulations do not merely require, for example, testing of an engineer who ran through signals or operated "overspeed," or of a brakeman who failed to apply the train's brakes properly, they require the testing of the entire crew and all of the "covered employees," including those who could not possibly have done anything to cause the accident or incident.

The blood and urine sampling and testing required by the FRA regulations are invasive and potentially humiliating

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4/ See Jt. App. 137-139, 163-168.

procedures. The blood test involves the insertion of a hypodermic needle into the employee and the drawing of a quantity of blood. The FRA acknowledges that this is an invasive procedure. 50 Fed. Reg. 31,556 (Aug. 2, 1985) ("drawing blood is invasive").

The urine testing procedure has enormous potential for humiliation. As the FRA stated in issuing its final rule, direct "observation of [urine] sample collection * * * is the most effective means of ensuring that the sample is that of the employee and has not been diluted." 50 Fed. Reg. 31,555 (Aug. 2, 1985). Accordingly, the FRA instructs (at 49 C.F.R. §219.205(a)) railroads to collect samples in compliance with its Field Manual, which provides:

> The employee will take urine collection cup into a private area designated by the physician/technician (a restroom or examining room is preferred). Under direct observation by the physician/

> technician, the employee will provide a urine specimen into the polystyrene cup. Employees must provide at least 60 ml of urine. Failure to provide a sufficient amount of urine may result in disciplinary action * * *.

Federal Railroad Admin., U.S. Dep't. of Transp., Field Manual D-5 (1986) (emphasis in original).

The blood and urine samples taken from the employees are then tested for the presence of alcohol and the metabolites of controlled substances.5/ Traces of marijuana and other controlled substances dissipate from the blood rather quickly, but metabolites of these substances remain and may be detected in urine for days, weeks, and sometimes months after the substance has been ingested.6/ As the FRA has acknowledged,

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5/ See Jt. App. 196-199.

6/ See, e.g., Schwartz & Hawks, Laboratory Detection of Marijuana Use, 254 J. Am. Med. Assn. 788 (1985).

presence of these metabolites does not establish that the employee is impaired, but only that the employee ingested the substance in the past.7/ Nor is it at all clear, as petitioners imply, that blood test results can demonstrate impairment.8/ An employee who refuses to submit to a blood or urine test is disqualified from employment in any of the jobs covered by the regulations for a period of nine months, in addition to any disciplinary action the railroad may take.9/ If an employee tests positive, that employee may be fired and may be subject to criminal prosecution as

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7/ 50 Fed. Reg. 31,550 (Aug. 2, 1985).

8/ See, e.g., Mason & McBay, Cannabis: Pharmacology and Interpretation of Effects, 30 J. Forensic Sciences 615 (1985).

9/ 49 C.F.R. §219.213(a). The nine-month disqualification precludes employment "by any railroad with notice of such disqualification."

well.10/

The parties disagreed as to the factual predicate for this invasive new program. The district court and the court of appeals both "assumed the seriousness of the problem" without any specific factual findings. Pet. App. 7a. The court of appeals, reversing an award of summary judgment for the government, held "that intrusive drug and alcohol testing may be required or authorized only when specific articulable facts give rise to a reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment." Pet. App. 36a.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case and its companion, National Treasury Employees Union v. Von

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10/ See 18 U.S.C. §342.

Raab, arrive at this Court at a time of unprecedented national concern over the effect of alcohol and drug use on the well-being of the country and its people. The blood and urine testing programs involved in these cases are but two small elements of a national campaign by the federal government to combat drug use. The government sees employee blood and urine testing as the most efficient means of accomplishing its law enforcement objective. As former Attorney General Meese explained to the United States Chamber of Commerce, "since most Americans work 'the workplace can be the chokepoint' for halting drug abuse."11/ Drug testing of all employees to achieve a "drug-free workplace" is but one element of the government's six-part

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11/ New York Times, Oct. 31, 1986, at 17.

antidrug offensive.12/

The ACLU shares the government's concern over drug abuse, and understands how that concern could tempt law enforcement officials to promote the kind of testing programs that are now before this Court. But the ACLU also realizes that troubled times and difficult national problems may pose great dangers to the Bill of Rights. As this Court eloquently noted in Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971):

> In time of unrest, whether caused by crime or racial conflict or fear of internal subversion, [the Fourth Amendment] and the values it represents may appear unrealistic or "extravagant" to some.

It is at such times that the greatest

12/ See National Campaign Against Drug Use, 23 Weekly Comp. Pres. Doc. 605 (May 30, 1987); The State of the Union, 23 Weekly Comp. Pres. Doc. 59, 76 (Jan. 27, 1987); National Campaign Against Drug Abuse, 22 Weekly Comp. Pres. Doc. 1040, 1041 (Aug. 4, 1986).

vigilance must be maintained to preserve the fundamental values enshrined in the Bill of Rights.

As serious as the problem of drug abuse may be, the "war on drugs" cannot be allowed to number among its casualties the Fourth Amendment. The government may understandably wish to search without probable cause or even reasonable suspicion in order to combat drug abuse, just as it might understandably wish to search to combat murder, rape, robbery and breaches of national security. As one federal court noted: "There is no doubt about it--searches and seizures can yield a wealth of information useful to the searcher. (That is why King George III's men so frequently searched the colonists.) That potential, however, does not make [a search] a constitutionally reasonable one."13/ The Fourth Amendment, as a general matter,

interferes with efficient government operations designed to promote important government and public interests. It does so to serve a higher value, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures * * *."

Amici's principal concern in this case is the wide-ranging effect the Court's decision may have on Fourth Amendment doctrine generally, and on the constitutionality of suspicionless blood and urine testing particularly. We certainly agree with respondents that the testing program involved in this case is unconstitutional under any "balancing" test that may be used to determine the "reasonableness" of a warrantless

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13/ McDonell v. Hunter, 612 F.Supp. 1122, 1130 (S.D. Iowa 1985), modified, 809 F.2d 1302 (8th Cir. 1987).

search. But we also believe that this is not a case in which such a "balancing test" should be substituted for the explicit constitutional requirement of a warrant and probable cause.

Moreover, amici find it difficult to see how any decision that upholds the blood and urine testing program involved in this case could be limited so as not to weaken the structure of the Fourth Amendment and to change the very nature of the relationship between the people of this country and law enforcement officials. This is not a case that can be limited to students,14/ or to prisoners,15/ or even to federal employees involved in enforcing the drug laws.16/ It involves private sector

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14/ See New Jersey v. T.L.O., 469 U.S. 325, 348-350 (Powell, J., concurring).

15/ See Bell v. Wolfish, 441 U.S. 520 (1979).
(Cont'd)

employees who certainly possess the full range of constitutional rights, and who do not shed their reasonable expectation of privacy at the workplace gate. O'Connor v. Ortega, 107 S. Ct. 1492, 1498 (1987). If the federal government can compel the railroads to administer blood and urine tests on these private employees in the absence of any particularized suspicion at all without violating the Fourth Amendment, it is difficult to see who would not be subject to forced, suspicionless testing.17/

16/ See National Treasury Employees Union v. Von Raab, No. 86-1879 (now pending). In citing these cases, amici certainly do not imply any agreement that students, prisoners, or federal employees enjoy reduced constitutional rights.

17/ See Safire, "Frisking Each Other," New York Times, March 14, 1986, at 35.

ARGUMENT

I. THE BLOOD AND URINE TESTING REQUIRED AND AUTHORIZED BY THE FRA REGULATIONS VIOLATE THE FOURTH AMENDMENT

The FRA regulations require railroads to search their employees for evidence of drug or alcohol use in the absence of any reason to believe that such evidence will be found.18/ The obvious threshold question presented by this case is thus whether there is any sufficient reason why the government should not be required to comply with the express textual command of the Fourth Amendment, i.e., to obtain a warrant based upon probable cause. The Fourth Amendment ensures "[t]he right of the people to be secure in their persons,

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18/ For the most part, we will refer to the mandatory blood and urine tests as searches. To the extent they require employees to turn over bodily fluids, the tests are certainly seizures as well.

houses, papers, and effects against unreasonable searches and seizures." "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, 387 U.S. 523, 528 (1967). It "protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967).

Whether government conduct constitutes a search or seizure--i.e., whether the Fourth Amendment applies in a given case--depends upon whether the search intrudes upon the individual's "reasonable expectation of privacy." Katz v. United States, 389 U.S. at 360-361 (Harlan, J., concurring). Once it is determined that the Fourth Amendment does apply, "except in certain carefully defined classes of cases," Camara v.

Municipal Court, 387 U.S. at 528, the search must be authorized by a warrant based upon probable cause. New Jersey v. T.L.O., 469 U.S. at 340; New York v. Belton, 453 U.S. 454, 457 (1981); United States v. United States District Court, 407 U.S. 297, 315 (1971); Camara v. Municipal Court, 387 U.S. at 528-529.

This Court has permitted limited exceptions to the express requirements of the warrant clause only in those "exceptional circumstances when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable". O'Connor v. Ortega, 107 S. Ct. at 1500; Id. at 1506 (Scalia, J., concurring) New Jersey v. T.L.O., 469 U.S. at 351 (Blackmun, J., concurring). In those exceptional cases, the search must be "justified at its inception" and must at a minimum be "reasonably related

in scope to the circumstances which justified the interference in the first place." New Jersey v. T.L.O., 469 U.S. at 341. And, in nearly all cases, and particularly where searches of a "personal nature" are involved, the search must be based on some reasonable degree of individualized suspicion. "Exceptions to the requirement of individual suspicion are generally appropriate only where the privacy interests implicated are minimal." Id., at 342 n.8.

As this Court has repeatedly recognized, privacy interests are never minimal when searches of the person are involved. "[E]ven a limited search of the person is a substantial invasion of privacy." New Jersey v. T.L.O., 469 U.S. at 337. See also Terry v. Ohio, 392 U.S. 1, 24-25 (1968). ("[e]ven a limited search of the outer clothing for weapons

constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience"). See also Camara v. Municipal Court, 387 U.S. at 537 (reduced degree of suspicion acceptable because housing inspections are not "personal in nature").

A. The Blood And Urine Tests Required By The FRA Regulations Constitute Searches Under The Fourth Amendment

The initial inquiry required in this case--whether the blood and urine testing required by the FRA regulations constitutes a search and seizure within the meaning of the Fourth Amendment--is not a difficult one. This Court has previously held that the compelled taking and testing of a person's blood implicates the "interests in human dignity and privacy which the Fourth Amendment protects" and is a search and

seizure. Schmerber v. California, 384 U.S. 757, 769-70 (1966). And all of the federal courts to address the question have held that compelled urine testing also comes within the Fourth Amendment's protection.19/

Considering the potentially humiliating nature of urine testing, and the vast array of "personal physiological secrets" that urine may hold (National Treasury Employees Union v. Von Raab, 816

19/ See, e.g., McKenzie v. Jones, 833 F.2d 335, 338 (D.C. Cir. 1987); Policeman's Benevolent Assn. v. Township of Washington, 850 F.2d 133, 135 (3d Cir. 1988); National Treasury Employees Union v. Von Raab, 816 F.2d 170, 176 (5th Cir. 1987); Lovvorn v. City of Chattanooga, 846 F.2d 1539, 1542 (6th Cir. 1988); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1266-67 (7th Cir.), cert. denied, 429 U.S. 1029 (1976); McDonell v. Hunter, 809 F.2d 1302, 1307 (8th Cir. 1987); Railway Labor Executives' Assn. v. Burnley, 839 F.2d 575, 580 (9th Cir. 1988); Everett v. Napier, 833 F.2d 1507, 1509 (11th Cir. 1987).

F.2d at 175), the lower courts are clearly correct in agreeing that urine testing constitutes a search. In the words of the Sixth Circuit, "[t]o hold otherwise would leave the government unrestrained in requiring urinalysis. We do not believe society would sanction a grant of power to the government that would have the effect of enabling the government to require a urine test of any individual it had legally stopped, even if it had no reasonable suspicion of drug usage. Such an approach would eviscerate the protections of the fourth amendment." Lovvorn v. City of Chattanooga, 846 F.2d at 1542. Petitioners concede that the blood and urine testing required under Subpart C of the FRA regulations constitute a Fourth Amendment search. Petitioners' Brief at 24-25 n.26.

B. The Tests Authorized By Subpart D Of The Regulations Also Constitute Searches Under The Fourth Amendment

Subpart D of the FRA Regulations authorize railroads to carry out urine and breath tests under certain circumstances. Petitioners argue that these regulations do not involve sufficient state action to come within the Fourth Amendment at all. Petitioners' Brief at 24-25 n.26.20/ The district court and the court of appeals both disagreed.

Although we agree that purely private action does not come within the Fourth Amendment, when the government actively encourages the private action and removes existing legal and

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20/ Petitioners concede that if the urine and breath testing authorized by Subpart D is regarded as state action, it constitutes a search under the Fourth Amendment. Ibid.

contractual impediments in the way of the private action, the line between purely private action and state action has been crossed. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164-165 (1978). The FRA, in Subpart D of its regulations, has established the authority of the railroads to test, and has specified in great detail the circumstances under which testing can occur and the testing procedures. The government involvement in Subpart D testing is thus a good deal more than "peripheral" and meets the requirements for state action. United States v. Guest, 383 U.S. 745, 755-56 (1966).

Moreover, as petitioners acknowledge, Subpart D of the FRA regulations goes well beyond merely authorizing the railways to conduct urine and breath tests. The regulations expressly pre-

empt any state or local laws that would limit the rights of railroads to engage in such testing. See 49 C.F.R. §219.13(a). Several states have enacted laws regulating blood and urine testing,21/ and some state courts have held that private sector blood and urine testing violates state constitutional and statutory protections.22/ In those states, railroads are "authorized" by federal law to disregard state law and to proceed with testing pursuant to Subpart D. Those railroads act with the imprimatur of the federal law. From the perspective of the employees who are

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21/ See, e.g., Mont. Code Ann. §39-2-304 (1987); R.I. Gen. Laws §28-6.5-1 (Supp. 1987); Vt. Stat. Ann. tit. 21, §§511-520 (1987).

22/ See, e.g., Hill v. NCAA, No. 619209 (Cal. Super. Ct., Aug. 10, 1988); Patchogue-Medford Congress of Teachers v. Board of Education, 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S. 2d 456 (1987).

subjected to testing under Subpart D (and who could not otherwise, under state law, be tested), the federal regulations are "the source of the power and authority by which [their] rights are lost or sacrificed." Railway Employees Dep't. v. Hanson, 351 U.S. 225, 232 (1956). See also, Communication Workers of America v. Beck, 108 S. Ct. 2641, 2656-2657 (1988).

In addition to pre-empting state laws that would prohibit or limit urine testing by employees, the FRA regulations strongly encourage testing by removing contractual barriers to testing and by relieving the railroads of their obligation to obtain the agreement of their unions before testing. As the FRA acknowledges, Subpart D "supersedes any provision of a collective bargaining agreement, or arbitration award construing such an agreement * * * ." 50 Fed. Reg. 31, 552.23/

As the FRA thus makes clear, Subpart D strongly encourages the railroads to engage in urine testing and removes substantial legal and contractual impediments to testing. Under the circumstances, there can be little doubt that Subpart D involves state action.

C. The Blood And Urine Testing Of Railway Employees In The Absence Of A Warrant Supported By Probable Cause Violates The Fourth Amendment

The Fourth Amendment begins by prohibiting "unreasonable searches and seizures," but it goes on to define reasonableness: a search or seizure is reasonable when it is authorized by a

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23/ The FRA further acknowledged in promulgating the regulations that:

> It is not reasonable to believe that the railroads will be able to make significant strides in addressing alcohol and drug use without the encourgement and tools provided by regulations.
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> 50 Fed. Reg. 31, 528 (Aug. 2, 1985) (emphasis added).

warrant based upon probable cause. United States v. United States District Court, 407 U.S. at 315. Without a warrant and probable cause, searches are "per se unreasonable * * * subject only to a few specifically established and well-delineated exemptions." Katz v. United States, 389 U.S. 347, 357 (1967).

Petitioners would stand the Fourth Amendment on its head, and make "reasonableness" (determined by "balancing") the norm, and warrants supported by probable cause the narrow exception required only in certain criminal cases. Their interpretation would equate the Fourth Amendment with a meager requirement that the government engage in cost-benefit analysis whenever it wants to search. If the benefit the government claims would be reaped by the search outweighs the costs to the individual subjected to the search, the

government action is reasonable and thus constitutional. This kind of cost-benefit analysis may be in vogue today, but the Framers of the Bill of Rights precluded that approach.

Contrary to petitioners' argument, "the Amendment does not leave the reasonableness of most [searches] to the judgment of the courts or government officers; the Framers of the Amendment balanced the interests involved and decided that a [search] is reasonable only if supported by a judicial warrant based on probable cause." New Jersey v. T.L.O., 469 U.S. at 351 (Blackmun, J., concurring).

This Court has not embraced the balancing approach as the touchstone for the Fourth Amendment. To the contrary, it has limited exceptions to the express requirements of the Fourth Amendment to those "exceptional circumstances when

special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." O'Connor v. Ortega, 107 S. Ct. at 1500; Id. at 1506 (Scalia, J., concurring); New Jersey v. T.L.O., 469 U.S. at 351 (Blackmun, J., concurring).24/ "Impracticable" does not mean inconvenient; it means "incapable of being performed or accomplished by the means employed or at command." Webster's Third International Dictionary (1971).

In this case, the government has failed to meet its burden of demonstrating that either of the express

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24/ We examine those "exceptional circumstances" more fully in the Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Louisiana filed in National Treasury Employees Union v. Van Raab (No. 86-1879) at pp. 12-15. As we demonstrate infra, the finding in O'Connor that there were exceptional circumstances does not apply in this case. See also our Von Raab brief at 18-19.

requirements of the Fourth Amendment--a warrant or probable cause--would be impracticable. As far as the warrant requirement is concerned, as the Court held in Schmerber v. California, it may be impracticable to require a warrant before a blood sample can be seized, but given the length of time drug metabolites persist in urine it would not be at all impracticable to require a warrant before urine samples may be seized. Nor would it be impracticable to require a warrant before the blood or urine samples are searched (i.e., tested) for evidence of alcohol or drug use. Once body fluids are removed from the body, any evidence of drug or alcohol use can be preserved by proper handling and storage of the fluids. The actual testing--the revelation of the physiological secrets contained in the urine--can wait until the government obtains a warrant.

As far as the second requirement of the Fourth Amendment, probable cause, is concerned, there is absolutely no reason why it would be impracticable to require probable cause before testing employees. Numerous studies and field evaluations have demonstrated that nonintrusive field sobriety and neurobehavioral tests can be used to establish probable cause to believe that an individual is impaired due to alcohol or drug use. See Jt. App. at 173-184 (describing Los Angeles Police Department's successful program for detecting drug or alcohol impairment); National Federation of Federal Employees v. Carlucci, 680 F. Supp. 416, 429-430 (D.D.C. 1988) (describing alternatives to urinalysis); Taylor v. O'Grady, 669 F. Supp. 1422, 1431-33 (N.D. Ill. 1987) (same).

In addition, the government has not

shown that it would be impracticable to await the results of prompt accident investigations that would determine whether the impairment of particular employees was--or could have been--responsible for the accident, incident or rule violation. In Schmerber, the Court made it quite clear that a blood sample could be taken only after a preliminary investigation gave the police officer probable cause to believe the motorist was intoxicated. The FRA regulations, in effect, would substitute the search for the preliminary investigation. The government seems to be arguing that because it would be easier to search than to conduct a prompt investigation, probable cause should not be required. But the Fourth Amendment prohibits such shortcuts.

The government has not shown that this case presents any of the

"exceptional circumstances [that] * * * make the warrant and probable cause requirement impracticable." Petitioners simply would like to search without a warrant and without probable cause because that would make their governmental objectives easier to accomplish. There is no doubt that the warrant and probable cause requirements of the Fourth Amendment often make it more difficult for the government to accomplish its objectives. But that is a cost we must incur to protect the important values that are reflected in the Fourth Amendment.25/

25/ In light of the fact that the courts below did not fully examine the question of whether a warrant and probable cause would be impracticable, if this Court does reverse the judgment of the court of appeals (and we urge the Court not to do so), the Court should at least remand the case for further factual development on the practicality of requiring probable cause and a warrant.

D. The Blood And Urine Testing Is Unreasonable In The Absence Of Individualized Suspicion

As we demonstrate above, the highly intrusive searches required by the FRA regulations should not be permitted unless the government complies with the express terms of the Fourth Amendment and obtains a warrant based upon probable cause. But even if the Court were to adopt the reasonableness/balancing approach advocated by petitioners and employed by the court of appeals below, the FRA regulations, which mandate intrusive personal searches without any showing of individualized suspicion whatsoever, should still be held unconstitutional.

In cases falling within those "few specifically established and well-delineated exceptions" where the balancing approach is appropriate, this Court has required a balancing of the

public interest necessitating the search against the invasion of individual privacy that the search entails. O'Connor v. Ortega, 107 S. Ct. at 1499; New Jersey v. T.L.O., 469 U.S. at 337. Although there is no fixed standard of reasonableness, it is clear that the search must be both "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." New Jersey v. T.L.O., 469 U.S. at 341.

This Court has never found a search as intrusive as those involved in this case to be "justified at its inception" without a high degree of individualized suspicion. "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by the search are minimal and where 'other

safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field."'" New Jersey v. T.L.O., 469 U.S. at 342 n.8 (quoting Delaware v. Prouse, 440 U.S. at 654-655).

In this case, the government has failed to demonstrate that its searches are either justified at their inception or reasonably related in scope to the circumstances justifying them.

1. The Searches Are Not Justified At Their Inception

The FRA regulations require employers to conduct extraordinarily intrusive searches without any individualized suspicion (reasonable or otherwise) that the employees searched have used alcohol or drugs or that employee impairment played (or could have played) any role whatsoever in the accident, incident or rule violation. As petitioners seem to

acknowledge, a suspicionless search as intrusive as those involved in this case is justified at its inception only when necessary to serve the compelling government interests. Winston v. Lee, 470 U.S. 766-767 (1985). See also New Jersey v. T.L.O., 469 U.S. at 343 ("the reasonableness standard should ensure that [individual interests] will be invaded no more than is necessary to achieve" the government objective).26/

In support of their assertion that the FRA regulations are necessary to serve "compelling" government interests, petitioners point to the long history of government concern with railroad safety

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26/ See Petitioners' Brief at 36 (arguing that "the FRA regulations serve compelling governmental interests"). See also National Federation of Federal Employees v. Carlucci, 680 F. Supp. 416, 431 (D.D.C. 1988) (government must establish "compelling need" for suspicionless testing).

and to the FRA's own, largely conclusory testimony that drug abuse has had a substantial impact on railroad safety. If that would suffice, a warrant and probable cause (or even reasonable suspicion) would never be required: certainly the government has at least an equally substantial interest in apprehending murderers, rapists, kidnappers and thieves (and in deterring others from such conduct); an even larger and more pervasive history of government concern with crime; and solid evidence of the negative impact of crime. There are many long-standing, compelling government interests, including crime control, regulation of morality and prevention of breaches of national security. If the invocation of such interests, with little more, could justify suspicionless searches, the Fourth Amendment would become meaningless.

To justify the highly intrusive, suspicionless searches required by the FRA regulations, the government must do more than merely assert a substantial government interest. It must show that unless it is permitted to conduct the search in the manner it proposes it will be unable to reasonably accomplish the government purpose. In other words, the government must show that the intrusion on Fourth Amendment interests is "no more than is necessary to achieve" its objectives. New Jersey v. T.L.O., 469 U.S. at 343. See also Winston v. Lee, 470 U.S. at 766-767. Petitioners have failed to meet that burden.

Petitioners' claim, put in constitutional terms, is that the government interest in railroad safety cannot reasonably be accomplished unless all of the members of a train's crew (as well as switchmen, dispatchers, signalmen

and other "covered employees") are subjected to blood and urine tests whenever a substantial accident, incident or rule violation occurs. In order to serve the government interest, petitioners claim, the blood and urine samples must be taken and tested even when there is no suspicion (reasonable or otherwise) that any action or omission of the particular employee caused or contributed to the mishap, and even when there is no suspicion that the impairment or malperformance of any employee played (or could have played) any role in the accident. As the record shows, when a tornado hits a train, all crew members--including ticket collectors--are subject to blood and urine testing. Jt. App. at 163-168.

Petitioners completely fail to support their claim that the FRA regulations invade Fourth Amendment

interests "no more than is necessary to achieve" their objectives. New Jersey v. T.L.O., 469 U.S. at 343.27/ They argue, without citing any substantial, objective evidence, that employees impaired by drugs or alcohol may show no outward signs of impairment that would give rise to reasonable suspicion.28/ To the contrary, the record indicates that supervisors or investigators can be

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27/ Where this Court has upheld suspicionless searches, it has found less intrusive alternatives (e.g. searches based on reasonable suspicion) impracticable. See United States v. Villamonte-Marquez, 462 U.S. 579, 589 (1983); United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976); Camara v. Municipal Court, 387 U.S. 523, 537 (1967).

28/ Petitioners' argument that testing is needed because it is otherwise difficult to detect impairment also ignores the fact testing blood and urine for the metabolites of drugs does not measure or demonstrate impairment. See 50 Fed. Reg. 31,500 (Aug. 2, 1985); Mason & McBay, Cannabis: Pharmacology and Interpretation of Effects, 30 J. Forensic Sciences 615 (1985).

trained to effectively detect employees who are impaired by drug or alcohol use without resort to such intrusive procedures as blood and urine testing. Jt.App. 173-184. See also Taylor v. O'Grady, 622 F. Supp. at 1431-1433. The FRA has even acknowledged that "supervisors can observe performance and judge whether it is up to standard." 50 Fed. Reg. 31,552 (Aug. 2, 1985). If promoting safety by detecting employee impairment is the government's interest, that interest can be served directly with far less intrusion upon Fourth Amendment interests. Any "incremental contribution to [railroad] safety" afforded by the invasive searches required by the FRA regulations hardly "justifies the [intrusive] practice under the Fourth Amendment" Delaware v. Prouse, 440 U.S. at 659.

In addition, even if it were true

that employee impairment might be hard to detect in some cases (and we dispute that), that would hardly justify a program that requires blood and urine testing in the absence of any evidence or suspicion that the impairment of a particular employee or group of employees caused or could have caused the accident, incident or rule violation. The fact that a few violators may go undetected has never been regarded as sufficient justification for a sweeping dragnet search like that petitioners propose. See, e.g., Delaware v. Prouse. One of the accepted costs of the Fourth Amendment is that some wrongdoers will evade detection. Petitioners' speculative claim that an uncertain percentage of alcohol or drug users may slip by hardly justifies engaging in an intrusive dragnet search of all employees without any reason to suspect them of

drug or alcohol use.

Petitioners also advance the related claim that suspicionless testing is needed to deter railroad employees from drug or alcohol abuse. To begin with, it is difficult to believe that the possibility of blood and urine testing following such a remote, irregular and uncertain event as a train accident will effectively deter employees who are not already deterred by the possibility of criminal penalties for drug use or by personal safety and health concerns. Nor is there any showing that suspicion-based testing does not adequately deter drug use. But even if such testing would deter some illegal drug use--and that seems very doubtful--that would not be enough to overcome the Fourth Amendment. Random searches of homes for contraband would deter much illegal activity. Similarly, random searches of

persons on the street would deter possession (and use) of illegal weapons and drugs. Dragnet searches are effective in intimidating the populace into complying with the law. As the New York Court of Appeals recently stated, "[i]f random searches of those apparently above suspicion were not effective, there would be little need to place constitutional limits upon the government's power to do so." Patchogue-Medford Congress of Teachers v. Board of Education, 70 N.Y.2d at 70. Suspicionless searches may deter illegal activity, but the cost of that deterrence in terms of human dignity and freedom is one the Framers of the Fourth Amendment found to be too great. The Fourth Amendment stands squarely for the proposition that suspicionless searches are not reasonably necessary to serve the governmental interest in deterring illegal activity.

To allow the government to require railroad employees to undergo blood and urine tests in the absence of any reasonable suspicion might very well be the first step toward a more comprehensive program of regular testing that would effectively deter drug and alcohol abuse. The government interest in safety and unimpaired performance does not begin and end with the railroads, however. Under the petitioners' rationale, for example, all motorists or pedestrians involved in "accidents, incidents or certain rule violations" could certainly be tested for drug or alcohol use, Schmerber v. California notwithstanding. Petitioners' rationale would also justify wholesale blood and urine testing of the entire working population, since workplace safety is an important, longstanding government interest. In fact, petitioners' rationale has no

effective limits, and would justify wholesale blood and urine testing of the entire population, not based on any reasonable suspicion, but based on a desire to deter wrongdoing. Such a law enforcement shortcut would fundamentally change the nature of our society and is a measure the Fourth Amendment does not, and this Court cannot, allow.

2. The Searches Required And Authorized By The FRA Regulations Are Not Reasonably Related In Scope To The Circumstances Justifying Them.

In addition to not being justified at their inception, the searches required and authorized by the FRA regulations are not reasonably related in scope to the circumstances that might justify them. These searches are highly intrusive, and are certainly not "sufficiently productive mechanism[s] to justify the intrusion on Fourth Amendment interests." Delaware v. Prouse, 440 U.S.

at 659.

The FRA regulations require the railroads to take blood and urine samples from employees following certain accidents, incidents and rule violations. This testing is highly intrusive in two respects: the sampling itself intrudes upon personal, bodily integrity, and the testing of the samples allows the railroad and the government to peer into the private and personal lives of employees.

This Court acknowledged the high degree of intrusion upon "fundamental human interests" involved in taking a blood sample in Schmerber v. California. The Court noted that exigent circumstances that may ordinarily justify searches of persons without probable cause "have little applicability with respect to searches involving intrusions beyond the body's surface. The interests

of human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." 384 U.S. at 769-770. The Court, noting that "[t]he integrity of an individual's person is a cherished value of our society," permitted blood sampling based upon probable cause and only "under stringently limited conditions * * *." Id. at 772.

Requiring employees to give urine samples is similarly invasive. The act of urination is a peculiarly private bodily function, one that is not normally done in the presence of others. As the Fifth Circuit noted in Von Raab:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a private function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social

> custom.

816 F.2d at 175. As the court of appeals below held, requiring employees to give urine samples "offend[s] human dignity and privacy and [is] degrading." Pet. App. 22a.

The potential for degradation and humiliation is greatest when the testing procedure requires direct observation of the act of urination. See, e.g., Taylor v. O'Grady, 669 F. Supp. at 1434 ("McNeal [an employee required to produce a urine sample under direct observation] testified that her experience was humiliating and hateful. I [Judge Getzendanner] found it painful to listen to her testimony when it was so obvious how embarrassing it was for her, both at the time of the test and when relating it publicly in the courtroom before me"). But, as the FRA acknowledged, direct "observation of urine sample collection

* * * is the most effective means of ensuring that the sample is that of the employee and has not been diluted." 50 Fed. Reg. 31,555 (Aug. 2, 1985). Therefore, the FRA regulations require the railroads to comply with the procedures set forth in the FRA Field Manual, which in turn require the employee to urinate into a small cup "[u]nder direct observation by the physician/technician * * *." FRA Field Manual D-5 (emphasis in original). Obviously such a procedure has enormous potential for degradation, humiliation and embarrassment. Petitioners' assertions to the contrary simply ignore human nature and reality.

In addition to involving invasive and degrading procedures, blood and urine testing provides the government with a window into the private, personal, off-duty lives of railroad employees. Not

only does the testing allow the government to monitor the off-duty use of alcohol and other drugs of abuse by railroad employees which may have occurred days or weeks before and may have no effect on job performance (see Court of Appeals opinion, 839 F.2d at 589) but it also reveals the use of legal drugs and may allow the government to learn of private and personal medical conditions for which those drugs are used. For example, testing can reveal the use of antidepressants and other drugs used to treat mental or psychological disorders. It can also reveal medical conditions such as pregnancy. As the Fifth Circuit noted in Von Raab, "even the individual who willingly urinates in the presence of another does not 'reasonably expect to discharge urine under circumstances making . . . discover[y of] the personal

physiological secrets it holds' possible." 816 F.2d at 175 (quoting from Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986)). Contrary to petitioners' assertion (Brief at 32), the FRA regulations do not prohibit testing for substances other than alcohol and drugs of abuse.

In an attempt to counter the strong evidence and the prior court determinations that blood and urine tests are intrusive and invasive personal searches, petitioners claim that the FRA regulations involve only a minimal intrusion on railway employees' expectation of privacy for three reasons: 1) the tests are conducted as an aspect of the employment relationship; 2) the discretion of government officers is limited; and 3) the testing procedures are narrowly tailored to protect privacy. None of these claims survive

close scrutiny, however.

To begin with, the requirement of drug and alcohol tests is not imposed by employers, but by the government. In this respect petitioners' argument amounts to nothing less than a claim that the government can avoid the full thrust of the Fourth Amendment by deputizing employers to conduct suspicionless searches. The rental housing market is heavily regulated in many states and cities (e.g., subject to rent control, stringent health and safety requirements and periodic inspections). Would the government argue that it could enact regulations requiring landlords to search apartments for evidence of drug use or other illegal activity on the grounds that renters have a reduced expectation of privacy in the landlord-tenant relationship? See O'Connor v. Ortega, 107 S. Ct. at 1505 (Scalia, J.,

concurring in the judgment); Mancusi v. DeForte, 392 U.S. 364 (1968).

Petitioners rely on O'Connor v. Ortega for the proposition that employees have a reduced expectation of privacy in the workplace. But both the nature of the government interest and the extent of the intrusion on individual interests were so different in that case as to be of little instructive value here. In O'Connor, the Court reasoned that government employers regularly need to enter the offices, desks and file cabinets of their employees "for legitimate work-related reasons wholly unrelated to illegal conduct." Thus, requiring a warrant and probable cause in such circumstances "would seriously disrupt the routine conduct of business and would be unduly burdensome." 107 S. Ct. at 1500. Examining employees' blood and urine can hardly be viewed as a

routine work-related event, like entering an office or looking for a file. Moreover, O'Connor did not approve even that less-intrusive search without individualized suspicion. It certainly cannot be said in this case that requiring reasonable, individualized suspicion before conducting blood and urine tests "would seriously disrupt the routine conduct of business." Furthermore, O'Connor did not involve searches of the person, and the Court emphasized the "'relatively limited invasion' of employee privacy. * * * The employee may avoid exposing personal belongings at work by simply leaving them at home." 107 S. Ct. at 1502. Certainly in this case the employees do not have a similar option of leaving their blood or urine at home (or in their bodies).

Petitioners also cite New York v. Burger, 107 S. Ct. 2636 (1987), and

Almeida-Sanchez v. United States, 413 U.S. 266 (1973), for the proposition that "persons who work in such 'closely regulated' industries have a 'reduced expectation of privacy' and 'in effect consent[] to the restrictions placed upon [them].'" Pet. Brief at 26. We find that patched-together quotation totally disingenuous. Neither of those cases involved or even discussed searches of workers employed in closely regulated industries. The fact that railroads are regulated does not mean that railroad employees are heavily regulated or have a diminished expectation of privacy. Indeed, this Court has never held that the "closely regulated industries" doctrine applies to searches of persons.

Petitioners' next argument--that the intrusion on individual privacy is minimal because the regulations give officials little discretion--is factually

mistaken and legally misplaced. As a factual matter, the regulations appear to give officials substantial discretion. Under Subpart C of the regulations, a railroad representative may exclude an employee from testing if he "can immediately determine, on the basis of specific information, that the employee had no role in the cause(s) of the accident/incident." 49 C.F.R. §219.203(a)(3)(i). Decisions of railroad representatives will be upheld if made in "good faith." 49 C.F.R. §219.201(c). These rules taken together obviously give railroad representatives enormous discretion particularly in borderline cases, discretion that can be used to engage in fishing expeditions, or to punish or harass disfavored employees. Railroad officials have even greater discretion under Subpart D, which authorizes--but does not require--them to

search under given circumstances. In those cases, officials have nearly complete discretion.

More importantly, the degree of official discretion (i.e., the "certainty and regularity" of the inspection; New York v. Burger, 107 S. Ct. at 2644) is not a factor to be included in the balancing process by which the degree of suspicion required to justify the search is assessed. Instead, it is a factor to be considered in deciding whether the usual requirement of a warrant can be disregarded. In Camara v. Municipal Court, the Court made it quite clear that the issue of official discretion is one that goes to the warrant requirement:

> The practical effect of [the present] system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search.

387 U.S. 532-33. Similarly, the passage from Delaware v. Prouse cited by petitioners spoke of safeguards, such as warrants, that are needed to cabin official discretion. 440 U.S. 653-654. See also New York v. Burger, 107 S. Ct. at 2644 (holding that "limit[ing] the discretion of the inspecting officers" is one of the "two basic functions of a warrant.")

Finally, petitioners argue that the intrusion upon employee privacy is minimal because the blood and urine tests are narrowly tailored to protect privacy. Even if it were true, as petitioners assert, that the intrusiveness of the blood and urine testing procedures has been reduced as much as possible, they still remain, by their nature, highly intrusive, invasive and degrading procedures. As this Court has noted, "even a limited search of a

person is a substantial invasion of privacy." New Jersey v. T.L.O., 469 U.S. at 337. The taking of a blood sample will always involve a physical invasion of bodily integrity. "The integrity of an individual's person is a cherished value of our society." Schmerber v. California, 384 U.S. at 772. Urine sampling, to be reliable and useful, will always involve performing a very private act under a degree of supervision guaranteed to humiliate the average person. Under the procedures required by the FRA regulations and the Field Manual, employees have to urinate in a small cup "[u]nder direct observation of a physician/technician." FRA Field Manual D-5. The potential for embarrassment and humiliation inherent in such a procedure is manifest. See, e.g., Taylor v. O'Grady, 669 F. Supp. at 1433-1435. And the bodily fluids will always contain

"physiological secrets" that the railroad, the government, the medical facility, or even the public at large may learn. To call these procedures a "minimal" invasion of privacy is to ignore reality.

Petitioners cite repeatedly to Schmerber v. California and Winston v. Lee for the proposition that blood testing is not a "substantially intrusive procedure." What they fail to emphasize is that in Schmerber the Court allowed a blood test only upon a showing of probable cause and emphasized that "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that the desired evidence may be obtained." 384 U.S. at 769. Similarly, in Winston v. Lee the Court held that even with probable cause and a court order the State could not force a suspect

to undergo a minor surgical procedure to remove a bullet lodged one inch under his skin. 470 U.S. at 766. These two cases hardly support petitioners' argument that in this case blood and urine tests should be permitted in the absence of any suspicion at all.

Although the searches involved in this case are highly intrusive, they are not highly productive. In fact, they do not come even close to being "sufficiently productive mechanism[s]" to justify the great intrusion upon personal privacy that they entail. The FRA's own statistics show that during the first two years of testing, only 5% of those tested showed evidence of alcohol or illicit drug use. Jt. App. 193. Put another way, 1432 of the 1508 employees subjected to invasive blood and urine tests during the two-year period showed no evidence of alcohol or illicit drug use. The FRA's

statistics do not reveal what proportion of the 5% who tested positive were later found to have contributed to the accident or incident that gave rise to the test. Because all members of train crews and all other "covered" employees (including employees who could not possibly have caused the accident or incident) are given the tests, the 5% figure is certainly a substantial exaggeration of the percentage of incidents caused by alcohol or illicit drug use.

As we point out above, other, less intrusive measures are likely to be much more productive mechanisms for detecting employee impairment due to drug or alcohol use or other causes. Adequate supervision, field sobriety and neurobehavioral tests (unlike blood and urine tests) detect impairment and do so in a noninvasive, nonintrusive way. In order to serve its asserted interest, the

government has chosen a highly intrusive, marginally productive mechanism. Such a mechanism is not "reasonably related in scope" to the government interests it allegedly serves.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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